WISCONSIN SUPREME COURT CALENDAR
AND CASE SYNOPSES
April 2004

This calendar contains summaries of upcoming Supreme Court cases. These brief synopses do not cover all issues that each case presents. These cases originated in the following counties:

Brown
Dane
Kenosha
Milwaukee
Sheboygan
Washington
Waukesha
Winnebago

THURSDAY, APRIL 1, 2004

9:45 a.m.	02-2438-D	In the Matter of Disciplinary Proceedings Against Jeffrey D. Knickmeier: OLR v. Jeffrey D. Knickmeier
10:45 a.m.	02-1974	Central Corp. v. Research Products Corp.
1:30 p.m.	02-2932	Nancy Megal v. Green Bay Area Visitor & Convention Bureau, Inc., et al.

IMPORTANT NOTICE: April 6 and 7 oral arguments will be held at the Racine County Courthouse, 730 Wisconsin Ave., Racine.

TUESDAY, APRIL 6, 2004 (RACINE)

9:30 a.m.	02-1273	Robert Kerl, et al. v. Dennis Rasmussen, Inc., et al
11 a.m.	03-0952-CR	State v. Jacob J. Faust
2 p.m.	02-2260	Adele R. Garcia v. Mazda Motor of America, Inc., et al.

WEDNESDAY, APRIL 7, 2004 (RACINE)

9:30 a.m.	00-0072	Yvette M. Maurin, et al. v. Gordon Hall, M.D., et al.
11 a.m.	02-1869-CR	State v. Iran D. Evans
2 p.m.	03-0471	Julie L. Weber, et al. v. Angelene White, et al.

THURSDAY, APRIL 8, 2004 (MADISON)

9:45 a.m.	02-3348-CR	State v. James L. Wright
10:45 a.m.	02-0359	Dewitt Ross & Stevens, S.C. v. Galaxy Gaming and Racing L.P., et al.
1:30 p.m.	02-3208	Chris Gentilli v. Board of Police and Fire Commissioners of the City of Madison, et al.

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WISCONSIN SUPREME COURT
THURSDAY, APRIL 1, 2004
9:45 a.m.

02-2438-D In the Matter of Disciplinary Proceedings Against Jeffrey D. Knickmeier:
OLR v. Jeffrey D. Knickmeier

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation (OLR) investigates and, if warranted, prosecutes the attorney. A referee – a court-appointed attorney or reserve judge – hears the discipline cases and makes disciplinary recommendations to the Supreme Court.

In this case, the Wisconsin Supreme Court will decide if the law license of a longtime McFarland lawyer should be revoked.

Jeffrey D. Knickmeier has practiced law in the McFarland/Madison area since 1978, emphasizing criminal matters, appellate work, and estate planning.

This case was tried before a referee (Reserve Judge Dennis J. Flynn) in Racine in September 2003. Flynn recommended that Knickmeier's license be revoked. This recommendation, now before the Supreme Court, was based upon a number of allegations of misconduct by Knickmeier, including:

- He borrowed $12,000 from a client in 1998, allegedly without disclosing to the client that he was already deeply in debt, and used the money to purchase a Cessna airplane. The OLR also alleged that he failed to pay back the loan, making partial payment only after the discipline proceeding started.

- He allegedly used this same client's money to buy tickets for Badger and Packer games, a one-half interest in a motorcycle, and pay his phone bill. Knickmeier testified that he kept control of this client's money so that the client would not waste it on alcohol and drugs, but acknowledged that he had not created an adequate plan for managing the account.

- He allegedly borrowed $2,000 from a woman whom he was representing in an eviction case, without disclosing his financial problems. He then allegedly rented a unit owned by the client discussed above, who was in prison at the time, to this woman, using the rent money to repay the money she lent him.

In response to these and other allegations, Knickmeier maintains that he has acted in his clients' best interest and that the OLR has held him to a higher standard than other lawyers are expected to meet.

The Supreme Court will hear from Knickmeier and the OLR, consider the recommendation of the referee, and determine what discipline to impose in this case.

WISCONSIN SUPREME COURT
THURSDAY, APRIL 1, 2004
10:45 a.m.

02-1974 Central Corp. v. Research Products Corp.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a judgment of the Winnebago County Circuit Court, Judge William H. Carver presiding.

In this case, the Wisconsin Supreme Court will give the lower courts guidance on handling business disputes over whether a distributor is a "dealer" for a certain manufacturer's products. Specifically, the Court will clarify if a trial judge may dismiss a lawsuit brought by a distributor who has been dropped by a manufacturer without conducting a hearing to explore the nature of the relationship between the two companies. Whether a distributor of a certain product is considered a dealership is important, because it has an effect on the distributor's legal rights when the manufacturer decides to stop supplying its products to the public through that particular channel.

Here is the background: Central Corp., a heating/ventilating/air conditioning (HVAC) distributor in the Fox River Valley, had a 20-year business relationship with Research Products Corp. (RPC), an HVAC manufacturer. RPC decided to end the relationship, and Central went to court to block this. Central argued that it was a dealership under the meaning of Wis. Stat. § 135.02 (3) (a), which defines "dealership" as:

> A contract or agreement, either express or implied, whether oral or written, between 2 or more persons, by which a person is granted the right to sell or distribute goods or services, or use a trade name, trademark, service mark, logotype, advertising or other commercial symbol, in which there is a community of interest in the business of offering, selling or distributing goods or services at wholesale, retail, by lease, agreement or otherwise.

RPC argued that Central was not a dealership, and the circuit court agreed, concluding that no significant economic relationship existed between the parties. In arriving at this conclusion, the trial court conducted an analysis that is required by a 1987 Wisconsin Supreme Court case[1] and found that:

- There was no written agreement between the two companies.
- Central could sell other, comparable products if the relationship ended.
- Central's sale of RPC's products accounted for only 5 percent of its gross profits.
- RPC had not required Central to perform duties normally expected of a dealer, such as advertising RPC products.

[1] Ziegler Co. v. Rexnord, Inc., 139 Wis. 2d 593, 407 N.W.2d 873 (1987)

Central appealed, and the Court of Appeals affirmed the circuit court's decision to grant summary judgment in favor of RPC, thereby dismissing the case.

In the Supreme Court, as in the Court of Appeals, Central argues that its lawsuit should not have been dismissed without a trial. The Supreme Court will decide whether summary judgment was an appropriate way to end this dispute.

WISCONSIN SUPREME COURT
THURSDAY, APRIL 1, 2004
1:30 p.m.

02-2932 *Nancy Megal v. Green Bay Area Visitor & Convention Bureau, Inc., et al.*

This is a review of a split decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed a judgment of the Brown County Circuit Court, Judge William M. Atkinson presiding.

In this case, the Wisconsin Supreme Court will decide whether a business may be held liable when a customer slips and falls on the premises even if the customer cannot prove how long the slippery spot was there.

Here is the background: On Feb. 6, 1998, Nancy Megal was one of an estimated 4,220 people attending Pocahontas on Ice at the Brown County Veterans Memorial Arena, a three-floor exhibition space that can seat more than 5,000 people. When the show ended, Megal was walking down a crowded stairway and could not see the steps in front of her. She stepped on a ketchup-soaked french fry on one of the bottom stairs, fracturing her left ankle. The ankle required surgical repair with plates and screws, and, according to her attorney, the injury left her with permanent pain and disability.

Megal sued the Green Bay Visitor & Convention Bureau, which leased the arena from Brown County, alleging that the bureau violated a Wisconsin law known as the safe place statute[2], which requires that a place of employment be kept as safe as the nature of the premises reasonably permits. In order to succeed, Megal had to show:

1. an unsafe condition existed;

2. an unsafe condition caused her injury; and

3. the bureau had actual or constructive notice of the condition before her injury occurred (meaning that the bureau was aware, or should have been aware, that the steps were slippery).

The circuit court concluded that Megal could not prove #3 above, and granted summary judgment in favor of the bureau, dismissing Megal's case. The Court of Appeals, with a dissent from Chief Judge Tom Cane, affirmed the trial court's ruling. In his dissent, Cane argued that Megal had a case that should have been allowed to go to trial:

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[2] Wis. Stat. § 101.11

[P]atrons were allowed to take their food anywhere in the arena; the arena employed as few as two janitorial employees, with possibly only one working the night of Megal's injury, to monitor the entire facility; there are no formal written procedures for inspection of the premises; and the employees do not conduct regular sweeps of the stairs or concourse areas to ensure they are clear of spills or other unsafe conditions…. Thus, a jury acting reasonably could charge the arena with having constructive notice of an unsafe condition….

The majority, on the other hand, concluded that permitting this lawsuit to proceed would open the season on similar litigation in all sorts of public places. Judge Gregory Peterson wrote:

How could the arena possibly have patrolled the entire facility to be on guard for something such as a spilled french fry? … Consider the ramifications for other public places…stadiums, theaters, restaurants, shopping malls. The list is endless. Imagine, for example, the consequences for Lambeau Field when more than 70,000 people are trying to exit at the end of a football game. Are they all required to sit in their seats until custodians have inspected all the stairways, hallways, aisles and rows?

Megal now has come to the Supreme Court, which will decide whether her case should have been allowed to proceed to trial even in the absence of proof about how long the hazard was present on the stairs.

This case will be heard in the Racine County Courthouse as part of the Supreme Court's 'Justice on Wheels'

WISCONSIN SUPREME COURT
TUESDAY, APRIL 6, 2004
9:30 a.m.

02-1273 Robert Kerl, et al. v. Dennis Rasmussen, Inc., et al

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a judgment of the Dane County Circuit Court, Judge Richard J. Callaway presiding.

In this case, the Wisconsin Supreme Court will decide whether Arby's, Inc., a national franchiser, may be held vicariously liable for a murder-suicide committed by an employee of a Madison Arby's franchise. Vicarious liability is a legal concept that means a party may be held responsible for injury or damage even though they were not actively involved in the incident if the party had supervisory authority over the person or people who caused the trouble. For example, contractors may be held vicariously liable if their subcontractors perform a job incorrectly, and parents may be held vicariously liable when their children cause harm or damage.

Here is the background: This case began with a murder-suicide in Madison. The gunman, Harvey Jerome Pierce, shot his ex-girlfriend, Robin Kerl, and her fiancé, David Jones, before turning the gun on himself. Jones and Pierce died; Kerl survived but is permanent disabled. Her guardian, Robert Kerl, joined David Jones' family in suing Arby's, Inc., for failing to properly supervise the franchise where Pierce worked.

Pierce committed the murder during his Arby's shift, after leaving the restaurant without permission. The franchise hired Pierce, a Dane County Jail inmate with work-release privileges, allegedly without knowing the details of his criminal background. The management also, according to the victims' families, failed to supervise him properly.

The trial court granted summary judgment in favor of Arby's, dismissing the case. The court concluded that Arby's had no control over hiring and firing at the franchise, and therefore could not be held responsible for the incident. The Court of Appeals agreed.

The families now have come to the Supreme Court, where they argue that the *right* to control, rather than the degree to which control is exerted, determines whether an entity may be held vicariously liable. The Supreme Court's decision in this case will have an impact on future vicarious liability cases involving franchises in Wisconsin.

This case will be heard in the Racine County Courthouse as part of the Supreme Court's 'Justice on Wheels' program.

WISCONSIN SUPREME COURT
TUESDAY, APRIL 6, 2004
11 a.m.

03-0952-CR State v. Jacob J. Faust

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed an order of the Sheboygan County Circuit Court, Judge Gary Langhoff presiding.

In this case, the Wisconsin Supreme Court will decide whether, when a drunk driving suspect consents to a Breathalyzer, this consent bars police from obtaining a blood sample without first obtaining a warrant.

In answering this question, the Court is expected to analyze its 2002 opinion in a Jefferson County case, State v. Krajewski,[3] to see if it requires clarification. In Krajewski, the Court held on a 5-2 vote that police may – without a warrant and without the individual's consent – draw blood for a blood-alcohol test. Writing for the majority, Justice David Prosser Jr., reasoned that, because alcohol leaves the bloodstream over time, this police action is permissible under the "exigent circumstances exception" to the Fourth Amendment warrant requirement. But one line in the Krajewski opinion led the lower courts in the current case, State v. Jacob Faust, to throw out the blood-test result:

> *The exigency that exists because of dissipating alcohol does not disappear until a satisfactory, usable chemical test has been taken.*

The lower courts in Faust, therefore, had to conclude that the exigency disappeared when a "satisfactory, usable chemical test" – the Breathalyzer – had been taken. Without an exigency, police must have a warrant to draw blood.

Here is the background of this current case: Jacob J. Faust was pulled over in Sheboygan on Feb. 19, 2002, because of a problem with his license plates. The officer noted that Faust appeared to be drunk, and Faust admitted having had five brandies. Faust failed field sobriety tests and blew a .13 on the Breathalyzer. As a third-offense drunk driver, Faust's legal limit was .08. He refused to take a blood test, and blood was forcibly drawn at the hospital, reflecting a .10 blood-alcohol level.

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[3] 2002 WI 97, 255 Wis. 2d 98, 648 N.W.2d 385 (cert denied by the U.S. Supreme Court)

Faust was charged with third-offense drunk driving. The circuit court threw out the blood-test result, agreeing with Faust's argument that, under Krajewski, it constituted an unreasonable search because the blood was obtained without a warrant after he had consented to a valid chemical test.

The Court of Appeals affirmed, but expressed concerns about throwing out the blood test, concluding that this result may not have been what the Supreme Court intended when it decided Krajewski.

The Supreme Court will clarify whether obtaining a breath test bars police from drawing blood without a warrant.

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This case will be heard in the Racine County Courthouse as part of the Supreme Court's 'Justice on Wheels'

WISCONSIN SUPREME COURT
TUESDAY, APRIL 6, 2004
2 p.m.

02-2260 *Adele R. Garcia v. Mazda Motor of America, Inc., et al.*

This is a review of a split decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha, but in this case with District IV – Madison – judges sitting), which affirmed an order of the Waukesha County Circuit Court, Judge Lee S. Dreyfus presiding.

In this case, the Wisconsin Supreme Court will determine whether the state's 'Lemon Law' requires the consumer to use specific language when requesting a replacement vehicle, and will clarify what constitutes a sufficiently specific request.

Here is the background: On Feb. 23, 2001, Adele Garcia purchased a new Mazda Tribute from Hall Imports, Inc. Within a few weeks, she began having serious problems with the transmission. The fixes were covered under the Mazda warranty, and Garcia took the car back to the dealership for repair. But the problems persisted and, after numerous trips to authorized dealerships, Garcia wrote to Mazda requesting a replacement vehicle under Wisconsin's Lemon Law.[4] Delivered to Mazda on Sept. 24, 2001, her letter read as follows:

> *It is my understanding that the Lemon Law in the State of Wisconsin is that after a reasonable number of unsuccessful repair attempts by Mazda or its authorized dealers, or that the vehicle has been out of service a specific number of days, that I'm entitled to either a comparable replacement vehicle or a refund of the purchase price. At this time the automobile has been out of service for a period of 16 days and I would like to have a replacement.*

Mazda responded by offering to reimburse her for six months of car payments and extend the warranty. She rejected that offer. Then, Mazda said it could not find a replacement vehicle and asked her to order a new one. When she placed this order, she was asked to pay more than $1,200 in sales tax and transfer fees. She refused to do this and, in November 2001, sued Mazda, claiming that the company had failed to meet the 30-day deadline set out in the statute for replacing the car or refunding her money.

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[4] Wis. Stat. § 218.0171

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Mazda filed a motion for summary judgment, asking the circuit court to dismiss the case on the ground that Garcia's letter was insufficient to trigger the 30-day deadline. The statute specifies that the consumer's request for a replacement must include an offer to transfer the title to the manufacturer and, within 30 days of that offer, the manufacturer must give the consumer a comparable new car or a refund. The circuit court agreed, and dismissed part of Garcia's case saying:

> *…[T]he statute is very clear [and] for this court to … simply disregard … the language in terms of what triggers the responsibility of the manufacturer … would, essentially, render that portion superfluous and unnecessary, meaning just simply a consumer writing to a manufacturer and saying, 'hey, I don't like this car, it's been a problem, I wish to have a new vehicle' would seem to be then sufficient under that kind of an interpretation. But that's not the way the Legislature has enacted the statute…."*

Garcia went to the Court of Appeals, which affirmed the circuit court's finding that Garcia needed to indicate specifically her willingness to transfer the title in order to trigger the 30-day deadline. Judge Paul Lundsten dissented, noting that he believed Garcia's letter clearly put the company on notice that she was offering to transfer the title back to Mazda under the Lemon Law.

Garcia now has come to the Supreme Court, which will decide whether Garcia's letter was sufficient to trigger the Lemon Law deadline.

This case will be heard in the Racine County Courthouse as part of the Supreme Court's 'Justice on Wheels'

WISCONSIN SUPREME COURT
WEDNESDAY, APRIL 7, 2004
9:30 a.m.

00-0072 *Yvette M. Maurin, et al. v. Gordon Hall, M.D., et al.*

This is a certification from the Wisconsin Court of Appeals, District II (headquartered in Waukesha). The Court of Appeals may certify cases that cannot be decided by applying current Wisconsin law. The Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case began in Washington County Circuit Court, Judge Lawrence F. Waddick presiding.

In this case, the Wisconsin Supreme Court will decide if the cap that the Legislature has placed on the amount of damages that may be awarded in wrongful death cases violates the state Constitution. The Court also is expected to clarify whether a plaintiff in a medical malpractice case may collect for wrongful death *and* non-economic medical malpractice damages. Non-economic damages are – unlike medical bills, for example – damages that are not easily quantified, such as pain and suffering or loss of companionship.

Here is the background: In March 1996, a 5-year-old Washington County girl named Shay Maurin died of complications due to diabetes. A jury found the girl's doctor, Gordon Hall, M.D., to be negligent in the death because he did not diagnose her diabetic condition. The jury awarded Shay's parents $550,000 for the little girl's pain and suffering and another $2.5 million in wrongful death damages for their loss of companionship.

Because the Wisconsin Legislature has enacted a cap on damages, the judge reduced the malpractice award from $550,000 to $100,000. On the wrongful death award, however, the judge concluded that the cap (which was $150,000 at the time, but has been raised to $500,000 for the wrongful death of a child and $350,000 for the wrongful death of an adult) is unconstitutional because it denies litigants the right to a jury trial, violates due process, and usurps the power of the judiciary. He awarded Shay's parents $2.2 million in wrongful death damages.

Hall appealed, arguing that the cap is constitutional, and also that the family should not have received both medical malpractice damages and wrongful death damages. The Court of Appeals asked the Supreme Court to take this case directly.

The Supreme Court will decide whether the cap that the Legislature has imposed on non-economic damages in wrongful death lawsuits is constitutional, and whether litigants may collect both non-economic medical malpractice damages and wrongful death damages.

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This case will be heard in the Racine County Courthouse as part of the Supreme Court's 'Justice on Wheels'

WISCONSIN SUPREME COURT
WEDNESDAY, APRIL 7, 2004
11 a.m.

02-1869-CR *State v. Iran D. Evans*

This is a review of a decision of the Wisconsin Court of Appeals, District I, but in this case with District IV – Madison – judges sitting. The decision affirmed in part and reversed in part convictions in Milwaukee County Circuit Court, Judge Victor Manian presiding.

In this case, the Wisconsin Supreme Court will decide if a Milwaukee teenager who was convicted of attempted first-degree murder and first-degree reckless injury received a fair trial. Specifically, the Court is expected to clarify what makes an alibi: must a defendant prove that it would have been impossible for him/her to commit the crime, or is "improbable" good enough?

Here is the background: On March 10, 1996, when Iran Evans was 16 years old, he allegedly shot Deric Devine, 22, four times on East Wright Street in Milwaukee. Evans and Devine knew one another, but were not friends. Just before the shooting, they passed on the sidewalk and exchanged brief words about a look that Evans' companion had given Devine. They kept walking, and then Evans allegedly came up behind Devine, called his name, and began shooting. Devine was hit in the upper arm, buttock, thigh, and lower leg.

Police arrested Evans three weeks later after they found him hiding in his mother's basement. Although a detective later testified that Evans confessed the shooting, and although Devine identified Evans as the shooter, Evans pleaded not guilty and tried to make a case for mistaken identity and police misconduct with the following:

- *Four witnesses who would testify that he was elsewhere at the time of the shooting (the judge did not allow them to testify because the information they intended to present was not time-specific enough to eliminate the possibility that Evans was at the scene of the shooting)*
- *An explanation for hiding (he said he hid because he had just been released from jail, and did not trust the police)*
- *Evidence that the detective to whom he allegedly confessed had been disciplined with an unpaid suspension, 11 years before, for untruthfulness. The detective acknowledged having Evans sign a blank statement form and then filling it in later, and said that he does this with every defendant. Evans testified at a pretrial hearing that he had agreed to sign the blank pages because the detective had assured him that he would fill in Evans'*

statement that he had not *been involved in the shooting. (While the judge characterized this procedure as "unusual", he declined to bar the statement from evidence, reasoning that it was up to the jury to decide whether the statement had been falsified).*

Evans was convicted and he appealed. The Court of Appeals threw out his attempted homicide conviction, concluding that the trial court had made an error by refusing to instruct the jury on first-degree reckless endangerment as an alternative to first-degree attempted homicide. The Court of Appeals decided there was no evidence that Evans had been attempting to kill Devine; in fact, the court noted, the shots were to non-vital parts of his body and Evans made no statement showing intent to kill. The Court of Appeals, however, left intact the first-degree reckless injury conviction. This conviction, along with lingering questions about whether the judge should have admitted into evidence the statement that Evans claimed was not his, is the subject of Evans' appeal to the Supreme Court.

The State also appealed to the Supreme Court, contesting the Court of Appeals' reversal of the attempted homicide conviction. The State challenges the Court of Appeals' procedures and reasoning, arguing that there was strong evidence of attempt to kill and that the only reason Devine was shot in the arm was that he was shielding his head.

The Supreme Court will analyze the numerous issues that this case raises, and clarify, among other things, what constitutes an alibi.

This case will be heard in the Racine County Courthouse as part of the Supreme Court's 'Justice on

WISCONSIN SUPREME COURT
WEDNESDAY, APRIL 7, 2004
2 p.m.

03-0471 *Julie L. Weber, et al. v. Angelene White, et al.*

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a portion of a jury verdict in Milwaukee County Circuit Court, Judge Thomas R. Cooper presiding.

In this case, the Wisconsin Supreme Court will decide whether a jury's award for future healthcare expenses, which was cancelled when the Court of Appeals found no credible evidence to support it, should be reinstated. Because doctors often cannot say with certainty how many visits a patient will require in the future, the Supreme Court's action in this case likely will have an effect in other, similar cases statewide.

Here is the background: A Union Grove woman, Angelene White, crashed her car into the back of a Wauwatosa woman's car at an intersection in the City of Milwaukee. The victim, Julie L. Weber, was diagnosed with whiplash and began to see a chiropractor. Weber sued White and White's insurer to recover her past and estimated future health-care expenses, and for compensation for both past and future pain, suffering, and disability. The jury award in Weber's favor totaled just over $43,000, including $5,000 for estimated future chiropractic expenses.

White appealed, arguing that Weber should not have received the $5,000 for future health care needs because of a lack of credible evidence about how much chiropractic care she would require. White had challenged this award in the trial court, but the judge permitted it to stand, concluding that the chiropractor's testimony was credible even though it was not specific.

The Court of Appeals reversed the trial court, agreeing with White that case law[5] requires awards for future healthcare expenses to be supported by evidence.

Weber now has come to the Supreme Court, which will decide whether she should be compensated for her future health-care needs even though she cannot reliably estimate what those needs might be.

[5] Ianni v. Grain Dealers Mutual Insurance Co., 42 Wis. 2d 354, 166 N.W.2d 148 (1969)

WISCONSIN SUPREME COURT
THURSDAY, APRIL 8, 2004
9:45 a.m.

02-3348-CR *State v. James L. Wright*

This is a certification from the Wisconsin Court of Appeals, District II (headquartered in Waukesha). The Court of Appeals may certify cases that cannot be decided by applying current Wisconsin law. The Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case began in Kenosha County Circuit Court, Judge David M. Bastianelli presiding.

In this case, the Wisconsin Supreme Court will decide whether a defendant who pleads "no contest" as part of a negotiated plea agreement gives up the right to challenge whether it is legal for the trial court to accept the plea. The Court also is expected to determine whether a drug conviction may be amended after-the-fact to reflect conviction of a lesser crime.

Here is the background: James L. Wright was charged with possessing 5.5 grams of crack cocaine with intent to distribute and he faced a sentence of between six and 31 years in prison and a fine of up to $500,000. At Wright's bail hearing, the State conceded that the crack had weighed only 2.9 grams, which meant Wright should have been charged with a lesser crime that carried a possible punishment of between four and 16 years' imprisonment. The judge directed the prosecutor to amend the criminal complaint, but that was not done.

Seven months later, Wright agreed as part of a plea bargain to enter a "no contest" plea in exchange for the State recommending that he receive a maximum of five years' incarceration. Judges are not bound by prosecutors' sentencing recommendations.

At the plea hearing, the judge engaged Wright in a Q & A known as a plea colloquy to make sure Wright understood his rights and the possible ramifications of entering a plea. During the colloquy, the judge referenced the correct possible maximum imprisonment and fine, but wrongly stated that the amount of cocaine was 5.5 grams. Wright indicated that he understood and wanted to proceed with the plea, and the judge accepted his "no contest" and convicted him of possessing between five and 15 grams of cocaine with intent to deliver.

Eighteen months later, Wright made a motion to withdraw his plea based upon the fact that the trial court relied upon wrong information to convict him. The judge denied the motion and instead directed that an amended judgment of conviction be filed to reflect that Wright had been convicted of the lesser crime.

Wright appealed, and the Court of Appeals certified the case to the Supreme Court, noting that the question of whether a defendant waives his/her right to challenge a conviction when s/he enters into a plea agreement is a recurring problem and an issue of statewide import.

The Supreme Court will decide whether Wright should be permitted to withdraw his "no contest" plea.

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WISCONSIN SUPREME COURT
THURSDAY, APRIL 8, 2004
10:45 a.m.

02-0359 *DeWitt Ross & Stevens, S.C. v. Galaxy Gaming and Racing L.P., et al.*

This is a review of a split decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed in part and reversed in part a decision of the Dane County Circuit Court, Judge Maryann Sumi presiding.

This case centers on a state law[6] that imposes interest charges on plaintiffs who reject reasonable offers to settle a dispute and then end up with a judgment that is less favorable than the settlement offer. The law exists to encourage the resolution of disputes, when possible, without the time and expense of a trial. The question in this case is whether the interest charge is meant to be a penalty imposed even in cases where the defendant is already collecting interest from the plaintiff on the past-due accounts.

This is an argument over payment of lawyers' fees. Galaxy Gaming and Racing had anticipated building a casino at the St. Croix Meadows Dog Track in the City of Hudson and, with representation from the Madison law firm of DeWitt Ross & Stevens, negotiated various agreements with the city while awaiting word on the casino application. The federal government ultimately turned down the casino application, and DeWitt's bills went unpaid. The firm charged Galaxy 18 percent interest on all amounts that were more than 20 days past due. This charge is common in contracts for legal work, and was spelled out in the contract that Galaxy had signed with DeWitt.

DeWitt ultimately sued Galaxy and, prior to trial, offered to settle the claim in exchange for payment of $370,000 within 15 days. The total amount actually owed was about $400,000, which included about $70,000 worth of interest. Galaxy turned down the offer and the case went to trial. DeWitt won a judgment of $407,498 plus an additional 12 percent interest as permitted by statute.

Galaxy appealed, and the Court of Appeals majority erased the 12 percent interest fees, calling the effective 36 percent interest rate "excessive". Judge Paul Lundsten wrote:

> *[A]n offeree may in good faith believe that a particular offer of settlement is unreasonable, and may have potentially meritorious defenses to advance, but, faced with the prospect of having to pay interest at the rate of over 30% for the months (or even years) which may intervene between the offer and judgment, the offeree may believe he or she has no choice but to capitulate.*

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[6] Wis. Stat. § 807.01

In a vigorous dissent, Judge Charles Dykman argued that the majority had gutted the statute by refusing to impose the interest. Dykman predicted that the result of this case would encourage others to delay paying on their delinquent accounts and remove the disincentive for them to refuse reasonable offers of settlement.

The Supreme Court will decide if DeWitt should be permitted to recover the 12 percent statutory interest on top of the 18 percent interest charged under its contract.

WISCONSIN SUPREME COURT
THURSDAY, APRIL 8, 2004
1:30 p.m.

02-3208 *Chris Gentilli v. Board of Police and Fire Commissioners of the City of Madison, et al.*

This is a certification from the Wisconsin Court of Appeals, District IV (headquartered in Madison). The Court of Appeals may certify cases that cannot be decided by applying current Wisconsin law. The Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case began in Dane County Circuit Court, Judge Paul B. Higginbotham (now a Court of Appeals judge) presiding.

In this case, the Wisconsin Supreme Court will decide if a trial court was correct in determining that, in finding just cause for a Madison firefighter's firing, it disposed of other questions the firefighter had raised about whether the Madison Board of Police and Fire Commissioners followed the law.

Here is the background: The Board of Police and Fire Commissioners of the City of Madison fired Chris Gentilli from the Madison Fire Department for off-duty drug use. Gentilli then filed two cases in the circuit court challenging this decision. The first raised the issue of whether there was 'just cause' for his termination. This is a statutory question requiring application of state law. The second, a petition for a writ of *certiorari*, asked the circuit court to review the actions of the board to determine if the board acted within its jurisdiction, and if it acted according to the law.

Certiorari is used to review an administrative agency's decision in instances where the Legislature has not set up a review process in the statutes. Where there *is* a statutory process in place, however, *certiorari* review is not available except for certain questions that the Supreme Court set out in a 1967 case.[7] In that case, the Court said that the state statutes provided the exclusive procedure for determining whether a police and fire board's actions were arbitrary, oppressive, or unreasonable, and for deciding if there was enough evidence to support a board's findings, but that questions about a board's jurisdiction and whether the correct theory of law was applied should be resolved through a *certiorari* review.

When the trial court summarily disposed of his petition for *certiorari*, Gentilli sought review in the Court of Appeals. In certifying the case to the Supreme Court, the Court of Appeals noted that under the 1967 rule, Gentilli's additional questions were correctly raised in the separate petition for *certiorari*. However, the

[7] State ex rel. Kaczkowski v. Board of Fire and Police Commissioners of Milwaukee, 33 Wis. 2d 488, 148 N.W.2d 44 (1967)

Court of Appeals noted that since that 1967 ruling, the statute has been modified.

The Supreme Court will clarify the interaction between statutory review of police and fire commission decisions and common law *certiorari* review.